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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
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Comments of United Calling Network, Inc.

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Summary

UCN submits that Section 251(a) of the new Act imposes a duty to interconnection at reasonable rates, terms and conditions on "telecommunications carriers" including all Commercial Mobile Radio Service (CMRS) providers. In light of this fact, UCN further submits that the Commission should itself assert jurisdiction over the terms of CMRS to CMRS interconnection to prevent certain California- based CMRS carriers from stonewalling UCN's attempts to interconnect with them. Alternatively, the Commission should clarify that the California Public Utilities Commission (CPUC) has continuing jurisdiction over CMRS to CMRS interconnection terms and conditions.

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United Calling Networks, Inc. (UCN), by its attorneys, respectfully submits these comments in accordance with the Commission's *Notice of Proposed Rulemaking*, CC Docket No. 96-98, released April 19, 1996 (the *"Notice"*). The following comments address the duty imposed on all "telecommunications carriers" by Section 251(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the Act) and are generally responsive to the *Notice* at paragraphs 245 - 249.

I. Introduction and Background

UCN is a California public utility authorized to resell switched cellular telecommunications services. UCN has developed and tested a unique resale switching network technology utilizing an AT&T 5ESS-2000 switch designed specifically to provide end users with prepaid cellular calling and enhanced fraud protection capabilities. The system is designed to interconnect between the FCC-licensed cellular carriers' mobile telephone switching office (MTSO) and the landline telephone network. Calls placed by UCN's cellular customers will be initially terminated at the underlying cellular carrier's MTSO and then transferred to UCN's switch; from the UCN switch, the call will be screened and validated, and then switched to the cellular or landline

telephone network for completion. Additionally, UCN's' switching facility will record the origination, duration, and destination of the call, and will also capture call rating information. UCN's network design facilitates the provision of prepaid cellular service by enabling customers to purchase a specific dollar amount of prepaid cellular service. When the prepaid amount is near exhaustion, the UCN's switch will generate a recorded message with instructions on how to obtain additional airtime. The cellular customer's prepaid account information is resident at the UCN's switch and is updated with each use of the cellular phone.

UCN's operations are dependent upon the resale of the underlying cellular licensee's service. However, UCN does not require the facilities-based carrier's switching and validation functionality. Consequently, the ability to obtain interconnection at the incumbent facilities-based cellular carrier's MTSO at reasonable rates, terms and conditions, is absolutely essential to UCN's efforts to market a viable, competitive alternative cellular service.

In making its public interest determination in the context of UCN's application for a Certificate of Public Convenience and Necessity, the California Public Utilities Commission (CPUC) doubtlessly recognized that the unique service offerings of UCN will likely extend cellular service to segments of society that otherwise might not be able, because of economic circumstances, to enjoy cellular service. Indeed, in an effort to promote such competitive alternatives to incumbent facilities-based cellular carriers in California, the CPUC ordered these facilities-based carriers to offer unbundled, tariffed rates to switched-based resellers, like UCN. Such rates were designed to

separate "the radio transmission bottleneck from other service functions..." *See Investigation on the Commission's Own Motion into Mobile Telephone Service and Wireless Communications*, Decision 94-08-022, Docket I.93-12-007, p. 75, filed December 17, 1993. In reliance on this decision, UCN, in conjunction with AT&T (now Lucent Technologies, Inc.) commenced the design and testing of the 5ESS-2000 switch in furtherance of its switched resale operations. After successful completion of the testing, UCN finalized its order for delivery of the 5ESS-2000 switch and an initial quantity of cellular phones. UCN's total expenditures for system design, testing and hardware purchases to date are in excess of $ 10 million dollars.

However, having made these investments in good faith and upon reliance of California regulatory scheme, the legal status of the CPUC's unbundled tariffing policy has come into question. Specifically, UCN has been denied a request for cellular unbundling (from Airtouch, Inc.), in the wake of the Commission's denial of CPUC's request to continue the regulation of cellular rates. *See Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates, Report and Order*, PR Docket. 94-105, FCC 95-195, released May 19, 1995 (*California Order*). Section 332(c)(3) of the Act, which generally preempts state regulation of CMRS end -user rates (unless the FCC rules to the contrary), is at the center of this dispute.

It is apparent that at least Airtouch believes that it has no obligation to offer interconnection as initially ordered by the CPUC despite section 332's reservation of state authority to regulate "other terms and conditions of [CMRS]." Indeed, the Los

Angeles Cellular Telephone Company (LACTC), (who along with Airtouch is one of the FCC-licensed cellular carriers in the Los Angeles Metropolitan Statistical Area (MSA)), has completely ignored an interconnection request tendered by UCN. That the Commission's *California Order* was the basis of the denial of interconnection-- at least in the case of Airtouch -- is demonstrated by Airtouch's reliance upon it in a letter sent to UCN. *See* Exhibit A.

Against this background, UCN submits that several actions should be taken by the Commission in the instant proceeding. First, the Commission should itself assert jurisdiction over the terms of CMRS to CMRS interconnection provided under Title I of the new Act, in order to avoid an unregulated interconnection environment which would doom entrepreneurs like UCN. Alternatively, the Commission should clarify that the CPUC has continuing jurisdiction over CMRS to CMRS interconnection terms, particularly in light of the fact that companies like UCN are clearly entitled to interconnect with CMRS providers under section 251(a) of the Act.

II. Section 251(a) of the New Act Requires CMRS to CMRS Interconnection And Requires Regulatory Oversight Of Interconnection Terms.

As a threshold matter, and as the following discussion demonstrates, section 251(a) of the Act will require CMRS to CMRS interconnection. This simple fact necessitates regulatory oversight over the terms and conditions of interconnection, as opposed to private negotiations between parties with unequal bargaining power. As previously referenced, UCN believes that this jurisdiction should be asserted by the

Commission. Failing that, the Commission should clarify the CPUC's continuing role over the terms of CMRS to CMRS interconnection. These points are discussed in order.

A. Section 251(a) Obligations

The new section 251(a) of the Act states that "[e]ach telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." The legislative history concerning section 251(a) discloses an underlying intent that all "telecommunications carriers," have a "general duty" to interconnect. "Telecommunications carrier" is in turn defined by the new Act as "any provider of telecommunications services," which are further defined as "the offering of telecommunications for a fee directly to the public. . ." Telecommunications Act of 1996, P.L. 104-104, sections 3(44) and (46) Both UCN and Airtouch are "telecommunications carriers" within the meaning of this section. Both provide "telecommunications services" and, indeed, both are common carriers under California and federal law. The Commission has tentatively concluded that CMRS providers are within section 3(44)'s definition of "telecommunications carriers" (Notice, at para. 168), and UCN submits that this conclusion is correct. Thus, Airtouch has an absolute duty to interconnect with UCN under section 251(a).

This absolute duty imposed by section 251(a) appears to be in addition to existing interconnection obligations set forth in sections 201(a) and 332(c)(1)(B) of the Act. For instance, section 201(a) of the Act requires all CMRS providers to furnish communications services upon reasonable request, and further requires common carriers to establish physical connections with other carriers. Similarly, section

332(c)(1)(B) requires common carriers to interconnect in the commercial mobile service context. Thus, the new Act, if not these preexisting statutory provisions, creates a clear statutory requirement for interconnection. Moreover, as innovative carriers like UCS continue to proliferate, the market demand for interconnection will continue to grow. These statutory requirements will be rendered meaningless, however, and price and service innovations denied to the public in the process, absent regulatory oversight over the terms and conditions of CMRS to CMRS interconnection.

B. The FCC Must Assert Its Jurisdiction Over the Rates, Terms and Conditions of CMRS to CMRS Interconnection

As previously indicated, UCN submits that it is absolutely essential for the Commission to establish regulations to ensure that the rates, terms and conditions of CMRS to CMRS interconnection are just and reasonable. Without regulatory oversight, the interconnection obligation established by section 251(a) likely will be subverted. For instance, incumbent CMRS providers could simply demand unreasonable interconnection terms and, as a practical matter, frustrate any interconnection at all. UCN submits that this result would be flatly contrary to both Congressional intent and relevant precedent. In this regard, the Commission should look at the design of the statute as a whole, and its object and policy in order to give meaning to section 251(a). *See Crandon v. United States*, 494 U.S. 152, 158 (1990); *McCarthy v. Bronson*, 500 U.S.136, 139 (1991). In so doing the Commission must assume, first and foremost, that Congress did not intend the duty to interconnect to be easily evaded through the

imposition of unreasonable rates terms and/or conditions of interconnection. Indeed, such an assumption would be entirely consistent with the Commission's previous finding that incumbent cellular carriers, without a specific mandate to interconnect with other telecommunications carriers, have demonstrated that they possess the incentive and ability to stall or avoid interconnection with other carriers. *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services* 10 FCC Rcd 10666, 10709 (1995) (*Second NPRM*) (recognizing that CMRS providers may have incentives to refuse to enter into resale arrangements with competing carriers). And, in at least two instances, switched based cellular resellers like UCN, have been denied interconnection with a facilities-based carrier. *See Cellnet Communications, Inc. v. New Par, Inc. d/b/a Cellular One*, File No. WB/ENF-F-95010; and *Nationwide Cellular Service, Inc. v. Comcast Communications, Inc.*, File No. WB/ENF-F-95011. Moreover, the Commission has acknowledged that incumbent facilities-based cellular carriers maintain significant market power as a result of their duopoly market position. *California Order* at para 15 and 35 (acknowledging that cellular markets are not fully competitive; and that cellular carriers earn economic rents). The advent of widespread provision of broadband PCS in competition is at least two years away. *California Order* at 32. Thus, in the near term, incumbent cellular providers like Airtouch and LACTC will continue their efforts to frustrate interconnection on reasonable terms. Accordingly, UCN believes that the Commission must specifically declare its willingness to effectuate section 251(a), through federal oversight of the terms and conditions of interconnection.

C. The FCC Should Clarify the Role of the CPUC *Vis-à-Vis* CMRS to CMRS Interconnection In Conjunction With Its Adoption of Federal Interconnection Rules

As stated above, UCN believes that the FCC should assert its jurisdiction over CMRS interconnection. Failing this, the Commission should make clear that CPUC maintains a role in this regard.

It is of critical importance to UCN that the Commission make this clarification as part of the adoption of implementing regulations in this proceeding as opposed to deferment of consideration of this issue to the *Second NPRM* in CC Docket 94-54. As stated herein, UCN has finalized arrangements to take delivery of an AT&T 5ESS-2000 switch costing millions of dollars. This switch will be of little or no benefit to UCN or its customers unless UCN can obtain interconnection from facilities-based carriers at reasonable rates, terms and conditions. Thus, UCN has a manifest need for clarification of these matters affecting its core business. In fact, the Commission itself has expressed its desire to articulate its policies, *vis-à-vis* CMRS interconnection, in a timely fashion, in recognition of "the fundamental importance of interconnectivity, and the needs of carriers and the investment community to understand how CMRS will be regulated." *Second NPRM at para. 2.*

Should the Commission fail to assert its jurisdiction over CMRS interconnection it must make clear that the CPUC maintains jurisdiction over the terms and conditions of interconnection as prescribed by section 332(c)(3)(A) of the Act. The purpose behind the CPUC's past assertion of jurisdiction over switch-based cellular resale has been

consistent with and in furtherance of Congress' goals to enable "telecommunications carriers" like UCN obtain interconnection with facilities-based carriers. And as discussed above, without regulatory oversight over the terms of interconnection, it is quite likely that UCN's efforts to offer compeititive alternatives will be frustrated.

Section 251(d) requires the FCC to include this clarification in its initial decision in this proceeding. Section 251(d) requires the Commission to adopt implementing regulations within 6 months of enactment to, *inter alia*, prescribe and enforce regulations to implement section 251 in a manner that does not "preclude the enforcement of any regulation, order, or policy of a State commission that . . . is consistent with the requirements of this section." Thus, the Commission must clarify that in the absence of federal regulatory oversight, the CPUC may proceed with regulation of the terms and conditions of CMRS interconnection and must do so within the statutory deadline imposed by section 251

III. Conclusion

For the forgoing reasons, UCN requests the Commission to recognize that the interconnection duty imposed on CMRS carriers by the new Act requires regulatory oversight of the terms and conditions. UCN submits the Commission itself should assert regulatory oversight over CMRS to CMRS interconnection in a manner that ensures interconnection on reasonble terms. Alternatively, UCN requests that the Commission clarify that the CPUC continues to have jurisdiction over CMRS to CMRS interconnection. This latter clarification is necessary to prevent a regulatory vacuum, wherein carriers like Airtouch and LACTC could continue their efforts to stonewall UCS's attempts to interconnect.

Respectfully Submitted,

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Exhibit A

AIRTOUCH™
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March 12, 1996

Mr. Alan L. Pepper, Esquire
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Re: Your request for Unbundled Cellular Service Tariffs

Dear Mr. Pepper:

I am writing in response to your recent "demand for unbundled cellular service tariffs." Last year, the California Public Utilities Commission declined to seek reconsideration of the FCC's denial of its petition to regulate cellular service rates. See the Commission's Press Release dated June 8, 1995. In connection with that Decision, the Commission announced that cellular carriers are not obligated to file unbundled wholesale tariffs with the Commission.

In addition, the recently enacted Telecommunications Act of 1996 does not require Commercial Mobile Radio Service Providers ("CMRS") to unbundle access nor file interstate tariffs, bundled or unbundled. Section 251 of the Act directs Local Exchange Carriers to provide access to network elements on an unbundled basis. Pursuant to section 3 of the Act, CMRS providers are explicitly excluded from the definition of a local exchange carrier.

> The term 'local exchange carrier' means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) . . . (emphasis added)

In conclusion, AirTouch does not offer cellular service on an unbundled basis.

Very truly yours,

Richard C Nelson

Richard C. Nelson
Director - Regulatory